IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN MELLOR and OLGA MELLOR, Respondents, v. PATRICK MCNIERNEY and PEGGY HOUGARDY, Appellants.	)	No. 62643-4-I DIVISION ONE UNPUBLISHED OPINION FILED: August 3, 2009

Grosse, J. — Where, as here, a settlement agreement entered into after arbitration specifically provides that the arbitrator shall have exclusive jurisdiction to resolve any disputes arising under the settlement agreement, the claim by a party to that agreement to the contrary is frivolous. The settlement agreement the parties executed also specifically provides for an award of attorney fees and costs where a claim is frivolous. Accordingly, the trial court correctly awarded the respondents their attorney fees and costs because the appellants' claim that the arbitrator lacked jurisdiction to adjudicate a dispute over whether they were in compliance with paragraph 7 of the settlement agreement was frivolous. We affirm the trial court and award the respondents their attorney fees on appeal.

FACTS[1]

Patrick McNierney and Peggy Hougardy (collectively, McNierney) share a driveway with their neighbors Steven and Olga Mellor (the Mellors). In 2006, the Mellors filed a lawsuit against McNierney seeking an injunction to prevent McNierney from blocking the Mellors' access to the shared driveway. The Mellors also asserted a claim of outrage. The parties went to mediation before the Honorable Terry P. Lukens (retired) and entered into a settlement agreement. Paragraph 7 of the settlement agreement provides:

> Any and all cameras, real or fake, and any motion detectors, signs, figurines, mirrors, directed toward the other party's property will be removed by the parties within 7 days and shall not be reinstalled. This term shall not preclude reasonable security devices (including motion detectors) so long as they are not triggered by activity on the other party's property.

Another provision of the settlement agreement provides:

> The parties agree that Judge Lukens shall have exclusive jurisdiction to resolve any disputes arising under this agreement. Unless the claim is frivolous, costs of any such dispute shall be borne equally by the parties.

After the parties entered into the settlement agreement, the Mellors believed that McNierney failed to comply with paragraph 7 of the agreement.

[1] This statement of facts is taken largely from the trial court's findings of fact entered with the order awarding the Mellors attorney fees and costs from which this appeal is taken. Appellants failed to comply with RAP 10.3(g), which requires a separate assignment of error for each finding of fact a party contends was improperly made and a reference to the finding by number. It appears that assignment of error 6 is a challenge to finding of fact 15, although the assignment of error does not identify a finding by number as required. Other than that finding, appellants have failed to challenge any of the court's other findings of fact. The remainder of the findings, therefore, become the established facts of the case. Olivo v. Rasmussen, 48 Wn. App. 318, 319 n.1, 738 P.2d 333 (1987).

McNierney disagreed. Accordingly, in April 2008, the Mellors asked Judge Lukens to schedule an arbitration hearing to resolve the dispute about compliance with paragraph 7. Judge Lukens responded that he would have jurisdiction to resolve the dispute only if all the parties so agreed. He determined that absent an agreement of the parties, a court order would be necessary to confer jurisdiction on him to adjudicate this dispute.

In June 2008, counsel for McNierney informed the Mellors' counsel that his clients would not consent to Judge Lukens' jurisdiction because they believed they were not in breach of the settlement agreement. Accordingly, Judge Lukens determined that he was unable to adjudicate the dispute over compliance with paragraph 7 of the settlement agreement absent a court order confirming his authority to do so.

Given McNierney's refusal to consent to Judge Lukens' jurisdiction, the Mellors filed a complaint to compel arbitration. In addition to seeking an order compelling arbitration, the Mellors sought an award of attorney fees and costs pursuant to the settlement agreement on the ground that McNierney's claim of lack of jurisdiction was frivolous. The trial court granted the Mellors' motion to compel arbitration, ordering that Judge Lukens had jurisdiction over any issue arising under the settlement agreement. The trial court reserved the issue of whether the Mellors were entitled to an award of attorney fees and costs on the ground that the claim of lack of jurisdiction was frivolous until resolution of the substantive issue before Judge Lukens.

The parties proceeded with arbitration before Judge Lukens in August 2008. McNierney counterclaimed for violation of paragraphs 2 and 4 of the settlement agreement.[2] Judge Lukens issued an interim award on September 22, 2008, finding that McNierney failed to "clear the decks," which was the intent and purpose of paragraph 7 of the settlement agreement:

> A review of the photographs contained in Petitioners' Exhibit 5 yields the conclusion that the decks have not been cleared. No trespassing signs, cones, and copies of the Injunction are posted on the fence. These are clearly facing the Petitioners' property and violate Paragraph 7. The spray painted sign has the same effect.

Judge Lukens also found that most, if not all, of the signs on the exterior of McNierney's property were addressed to contractors working on the Mellors' property. He also found that the evidence showed that the Mellors' contractors violated the terms of the earlier injunction and that it was not unreasonable for McNierney to inform the contractors of the location of the property line and to enforce their rights under the injunction. Judge Lukens concluded, however, that once the contractors completed their work, any continuation of the signs would be a violation of paragraph 7. Judge Lukens ordered McNierney to remove the signs, traffic cones, copies of the injunction, the spray painted address on the driveway, and any other sign or notice on the fence or property

[2] Pursuant to paragraph 2 of the settlement agreement, McNierney is prohibited from contacting any professional working for or employed by the Mellors. The Mellors are required to ensure that any work by these professionals affecting or relating to the McNierney's property will be provided to McNierney on a reasonably prompt basis. Pursuant to paragraph 4, McNierney agrees that, with respect to any shoring or slope stabilization issues affecting their property, "the conclusions and direction of the Mellor GeoTech (Johnny Chen) will be acceptable."

line facing the Mellors' property within 72 hours of being notified that the Mellors had listed their house for sale. Judge Lukens dismissed McNierney's counterclaim with prejudice and, finding that no claim or counterclaim was frivolous, declined to award either party attorney fees.

After entry of Judge Lukens' interim award, the Mellors filed a renewed motion for attorney fees and costs, arguing that McNierney's claim that Judge Lukens lacked jurisdiction to adjudicate the dispute was frivolous.[3] The trial court granted the Mellors' motion, finding that the Uniform Arbitration Act, chapter 7.04A RCW, "and other uncontroverted legal authority" required the dispute to be arbitrated by Judge Lukens pursuant to the terms of the settlement agreement and that McNierney's "attempt to avoid arbitration before Judge Lukens constituted a frivolous claim." The court further found that McNierney's claim of lack of jurisdiction was frivolous because it lacked factual and legal bases. The trial court awarded the Mellors $3,570.50 in attorney fees and $245.00 in costs.

McNierney appealed the order awarding the Mellors attorney fees and costs. The Mellors filed a motion on the merits to affirm and seek an award of attorney fees on appeal. A commissioner of this court denied the Mellors' motion on the merits and set the appeal before a panel of judges.

ANALYSIS

McNierney assigns error to finding of fact 15 to the extent the trial court

[3] As noted, in its order granting the Mellors' motion to compel arbitration, the trial court reserved this issue until after arbitration of the substantive dispute.

found that Judge Lukens decided the substantive claim in the Mellors' favor and that McNierney was in violation of paragraph 7 of the settlement agreement. We need not address whether this finding is supported by substantial evidence because the finding has no bearing on the issue presented, which is whether the trial court erred in awarding the Mellors attorney fees. In their argument, McNierney fails to distinguish between the claim that Judge Lukens lacked jurisdiction to adjudicate the dispute over McNierney's compliance with paragraph 7 and the claim McNierney they did not violate paragraph 7. The award of attorney fees at issue here is based on the trial court's determination that McNierney's claim of lack of jurisdiction was frivolous. The award had nothing to do with Judge Lukens' interim award addressing the substantive issue of whether McNierney violated paragraph 7. Accordingly, whether the portion of the trial court's finding of fact to which McNierney assigns error is supported by substantial evidence is not relevant to whether the trial court erred in awarding the Mellors attorney fees and costs.

McNierney argues that because Judge Lukens declined to award either party attorney fees after arbitration of the substantive issues, the trial court erred in awarding fees for a frivolous claim. We disagree. The award of attorney fees at issue in this appeal is based solely on the trial court's determination that McNierney's claim of lack of jurisdiction was frivolous. The award was in no way based on the outcome of the adjudication of the substantive dispute. Whether Judge Lukens was correct in declining to award either party attorney fees with

regard to the substantive claims has no bearing on the issue of whether McNierney's refusal to acknowledge Judge Lukens' jurisdiction in the first place was frivolous.

McNierney argues further that the attorney fee award was based on testimony that should have been stricken, namely declarations of the Mellors' counsel submitted in support of their motion to compel arbitration. McNierney argues that the declarations contain testimony by an attorney acting as a witness and therefore violate CR 43(g) and Rules of Professional Conduct (RPC) 3.7. McNierney also argues that, to the extent counsel stated in one declaration his opinion as to the marketability of the Mellors' property, the declaration should be stricken because counsel did not demonstrate his qualification to act as an expert with regard to this issue and did not set forth the methodology he used to analyze the marketability of the property as required by ER 702.

The Mellors argue that McNierney did not raise these issues below and therefore cannot raise them for the first time on appeal. McNierney argues that they raised the issue by virtue of the following argument in their opposition to the Mellors' motion to compel arbitration:

> In support of Plaintiffs' motion is Plaintiffs' counsel's declaration which contains conclusory statements that the Defendants "failed to abide by either the letter or the spirit of the Settlement Agreement by re-installing signs, figurines, and cameras directed towards the Mellor's [sic] property." [Plaintiffs' counsel's] averments should not be considered as they are conclusory statements and not competent evidence.[4]

We disagree. This argument fails to raise the issues of the admissibility

[4] (Internal footnote omitted).

of the declarations in light of CR 43, RPC 3.7, or ER 702.

McNierney argues in their reply brief that they also raised these issues in their prehearing brief submitted to the trial court. Although this prehearing brief is attached to McNierney's reply brief, it is not properly part of the record before us. McNierney did not designate the prehearing brief as part of the record on appeal as required by RAP 9.6, either by an initial designation of clerk's papers or by filing a supplemental designation. We do not consider evidence not made part of the record.[5] Moreover, any issue as to whether the Mellors' counsel improperly testified as an expert with regard to the marketability of their property is not relevant to the issue on appeal of whether the trial court correctly determined that McNierney's claim that Judge Lukens lacked jurisdiction was frivolous.

McNierney argues further that the award of attorney fees to the Mellors is improper because the Mellors failed to timely comply with the requirement in King County Local Rule (KCLR) 4 regarding service of the case schedule. Once again, McNierney failed to raise this issue before the trial court and has therefore waived it for purposes of appeal.[6]

McNierney raises new issues in their reply brief regarding a declaration of Mark DeSpain, a real estate agent. We do not consider issues raised for the

[5] Adams v. City of Spokane, 136 Wn. App. 363, 367, 149 P.3d 420 (2006).
[6] Further, it appears from the record that the clerk of the court did not issue a case schedule upon the Mellors' filing of their complaint as required by KCLR 4. The parties stipulated to a case schedule. McNierney fails to explain why a delay in the issuance of the case schedule is a ground for reversal of the award of attorney fees, nor can we discern such a reason.

first time in a reply brief.[7] Further, in support of these issues, McNierney relies on evidence that is not properly part of the record on appeal.

[7] West v. Thurston County, 144 Wn. App. 573, 580, 183 P.3d 346 (2008).

The Mellors' Request for Attorney Fees on Appeal

The Mellors request attorney fees on appeal under both the settlement agreement and RAP 18.9. Where a statute or contract allows an award of attorney fees at trial, we have the authority to award fees on appeal.[8] Here, the settlement agreement allows for an award of attorney fees if a claim under the agreement is frivolous. The trial court awarded the Mellors attorney fees under this provision. Because the Mellors have prevailed on appeal, we award them their attorney fees under RAP 18.1 in an amount to be set by a commissioner of this court. We need not and do not determine whether the Mellors are entitled to an award of attorney fees under RAP 18.9.

We affirm. We award the Mellors their attorney fees on appeal provided they comply with RAP 18.1.

Grosse, J.

WE CONCUR:

Appelwick, J.

Ajid, J.

[8] RAP 18.1; Bloor v. Fritz, 143 Wn. App. 718, 753, 180 P.3d 805 (2008).